

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NICKEY L. SELF

Claimant

VS.

SHAWNEE COUNTY

Self-Insured Respondent

Docket No. **1,036,017**

ORDER

Self-insured respondent requests review of the November 20, 2007 preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained his burden of proof that he suffered accidental injury arising out of and in the course of employment and that he provided timely notice. The ALJ ordered respondent to provide claimant medical treatment with Dr. Michael Smith.

The respondent requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment; (2) whether claimant gave timely notice; (3) whether or not claimant suffered a series of accidents; and, (4) whether respondent had knowledge of the accidental injury of May 24, 2007. Respondent argues claimant's testimony and the medical evidence support a finding of a traumatic event and not a series of micro traumas. Respondent further argues claimant did not give timely notice of his accident within 10 days and therefore the ALJ's Order should be reversed.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant became employed as a correction specialist for the Department of Corrections on July 10, 2006. On May 24, 2007, he participated in a defensive tactics class. During the training claimant described two incidents where he was knocked down.

Initially, claimant landed on the mat where the training was taking place but when he jumped up and physically re-engaged with the instructor, he was swept off his feet, landed on his buttock and went sliding across the gym floor. Claimant noted at the time he had some pain in his lower back from hitting the floor. Trainees are periodically asked if they are okay and claimant agreed he did not complain of injury.

Gwendolyn Kennedy, a self-defense instructor, testified that she was one of the instructors at the training on May 24, 2007, and she observed the participants. She testified that she did not see claimant either knocked down on the mat or knocked down onto the floor as claimant had described. Sergeant John Carlson also participated in the training class and was identified by claimant as the instructor who knocked him down onto the mat. Sergeant Carlson could not recall knocking claimant down onto the mat. Trevell Smittick, a correctional officer, also participated at the training class and was identified by claimant as the instructor who lifted his legs from under him causing claimant to fall onto the floor. Officer Smittick did not recall the incident but denied he would have grabbed claimant and lifted his feet from under him. But Officer Smittick agreed that people do fall down during training.

Claimant testified his neck began to hurt about two or three weeks after the accident. But he did not give it much thought until he later began to have numbness in his left arm and hand. On July 13, 2007, claimant sent an e-mail to respondent's safety officer, James Worley, providing notice that he injured his neck and low back after landing hard on his buttocks during the training. Claimant further noted that he had made a doctor's appointment.

Mr. Worley testified he received an email on July 13, 2007, notifying him that claimant had been injured during the training class on May 24, 2007. Since Mr. Worley was respondent's work comp coordinator, he contacted the County Counselor due to the claim being reported after the 10-day time frame. Mr. Worley completed an accident report and no medical treatment was offered since claimant had already sought treatment on his own.

Claimant sought treatment with Dr. William O. Reed Jr. on July 19, 2007, due to complaints of cervical and left arm pain. The doctor performed a physical examination and prescribed epidural steroid injections as well as pain medications. Claimant testified the steroid injections did not improve his condition.

Although claimant had neck problems in the past he noted that between the time he had retired from Goodyear and before going to work for the Department of Corrections, he did not have any problems with his neck nor did he seek medical treatment. Claimant testified:

Q. What makes you think that being thrown on your rear end during this training program in May of '07 is the cause of your neck pain?

A. Because after surgery, life was looking good. I was feeling good, and then I wasn't having aches and pains. I was able to get out of bed every morning, and then my neck was feeling good. And then shortly after I got thrown down twice, I started having symptoms and pain.¹

Upon questioning from the ALJ, the claimant testified that as he continued working after the incidents at the defensive tactics training his neck and arm pain was aggravated especially when he was routinely required to conduct searches of the inmates' cells.

Initially, the respondent denied claimant suffered accidental injury arising out of and in the course of his employment. There is no question that claimant participated in defensive tactic training which admittedly required physically combative activity. Although the instructors could not recall the specific incidents, nonetheless, it was agreed people do fall down during training. And a fall would not be unexpected as the training was conducted on a mat on the floor. The claimant has described the type of training he was engaged in when the incidents occurred and the instructors agreed that was the type of training that occurred that day. The claimant has met his burden of proof that he was knocked to the floor and suffered accidental injury arising out of and in the course of his employment.

The next issue is whether claimant provided timely notice of his accidental injury.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Although claimant alleged injury on May 24, 2007, during questioning from the ALJ claimant further agreed that his neck and arm was aggravated as he continued performing

¹ P.H. Trans. at 24.

his regular job duties. Consequently, the ALJ concluded claimant suffered injury on May 24, 2007, and a continuing series of repetitive traumas as he continued working. This Board Member agrees and affirms.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

(d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.² (Emphasis added.)

As the claimant gave written notice to respondent on July 13, 2007, that is the date of accident and notice was timely.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

² K.S.A. 44-508(d).

³ K.S.A. 44-534a.

⁴ K.S.A. 2006 Supp. 44-555c(k).

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated November 20, 2007, is affirmed.

IT IS SO ORDERED.

Dated this 29th day of February 2008.

DAVID A. SHUFELT
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Larry D. Karns, Attorney for Respondent
Brad E. Avery, Administrative Law Judge